WALTER PATHROSE GOMEZ & ORS A

v.

SENTUL RAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: S6-24-2072-2003]
26 FEBRUARY 2007

LAND LAW: *Housing developers - Damages for late delivery - Whether purchasers could set off against balance sum of purchase price due to developer - Whether purchasers entitled to liquidated damages under sale and purchase agreement - Whether time of the essence - Whether s. 56 Contracts Act applicable* C

CONTRACT: *Building contract - Delay - Damages for late delivery - Whether purchasers could set off against balance sum of purchase price due to developer - Whether purchasers entitled to liquidated damages under sale and purchase agreement - Whether time of the essence - Whether s. 56 Contracts Act applicable* D

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The plaintiffs were purchasers of condominium units under a sale and purchase agreement ('the agreement') with the defendant developer. The defendant did not complete the units within the time specified in the agreement. Therefore, when the defendant claimed for the outstanding sum from the plaintiffs, the plaintiffs F demanded that it be set off against their claim for liquidated damages for late delivery. The events that followed led to the plaintiffs' action against the defendants for liquidated damages until the date of actual delivery of vacant possession.

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Held (in favour of the plaintiffs):

(1) Section 56 of the Contracts Act 1950 concerns the effect of failure to perform at the time fixed for doing so. If time is not of the essence, the contract does not become voidable by the H failure to do the thing at or before the specified time. If time is of the essence, the contract will become voidable. Sub-section (3) provides that where the contract becomes voidable on account of the promisor's failure to perform his promise at the agreed time and the promisee accepts the I delay, the promisee cannot claim compensation for loss unless he gives notice to the promisor at the time of his acceptance. (para 13)

(2) Clause 7 of the agreement provided that time was of the essence. Yet at the same time and having agreed upon cl. 7 the parties, at cls. 22 and 24 of the agreement provide for payment of liquidated damages in the event of delay in handing over vacant possession and completion of common facilities. It was plain that the parties had not stopped at simply providing that time was of the essence but qualified their agreement as to the time specified for completion by specifically providing for liquidated damages for delay in handing over vacant possession. Clause 7 was not a true "time of the essence" clause as envisaged by s. 56(1) of the Contracts Act 1950. Therefore, ss. 56(1) and 56(3) were inapplicable. For this reason, the defendant's reliance upon s. 56 of the Contracts Act 1950 must fail. (paras 15, 16 & 17)

(3) It was not shown that the agreement provided for economic downturn nor defined it for that purpose as a ground to be relieved of the obligation to liquidated damages or performance. Not only the defendant but also the plaintiffs suffered from the delay caused by the economic downturn. Without specific provision for delay due to the economic downturn to exclude liability, the liquidated damages' clause remained applicable. (para 18)

Case(s) referred to:

City Investment Sdn Bhd v. Koperasi Serbaguna Tanggungan Bhd [1985] 1 MLJ 285 ***(refd)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***

Sakinas Sdn Bhd v. Siew Yik Hau [2002] 3 CLJ 275 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 56(1), (3)

For the plaintiffs - NV Sree Harry; M/s Sree Harry & Co

For the defendant - Sylvia Cotter; M/s Logan Sabapathy & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

Background Facts

[1] Between 21 September 1995 and 8 August 1997 the plaintiffs purchased condominium units from the defendant under standard sale and purchase agreements by the defendant.

[2] Under cll. 22(1) and 24(1) of the sale and purchase agreements, handing over of vacant possession of the condominium units and the completion of the common facilities are agreed to be within 36 calendar months of the date of the sale and purchase agreements. By sub-cl. (2) of the aforesaid clauses, the defendant agreed to pay the purchasers liquidated damages in the event of delay.

[3] The original dates for delivery of vacant possession and completion of common facilities (completion dates) would, therefore, have been between 21 September 1998 and 8 August 2000.

[4] The construction of the Sang Suria Condominiums was completed and notices for delivery of vacant possession were issued to the plaintiffs on 30 September 2002. The purchasers, through their solicitors' letter of 9 October 2002, demanded the defendant to issue fresh notice of vacant possession after having set-off the progress payment against liquidated damages.

[5] Instead, the defendant issued letters to the plaintiffs threatening to annul their sale and purchase agreements and forfeit 10% or 20% of the purchase price plus interest if the purchasers failed to settle the outstanding progress payments and interest within 14 days thereof.

[6] The plaintiffs collected their keys on 2 December 2002, 8 January 2003 (2nd & 3rd), 4 April 2003, 6 March 2003 (5th & 6th), and 31 March 2003.

[7] The plaintiffs filed this action on 29 October 2003.

[8] The plaintiffs have prayed for entitlement to liquidated damages until the date of actual delivery of vacant possession. It was submitted for the defendant that cl. 23(2) of the sale and

purchase agreement is to protect developers against improper claims for liquidated damages - that upon expiry of 14 days after date of notice the plaintiffs are deemed to have taken vacant possession.

The Sale And Purchase Agreement

[9] The sale and purchase agreements provide:

22. Time For Handing Over Of Vacant Possession

(1) Vacant possession of the said Parcel to which water and electricity supply are ready for connection shall be handed over to the purchaser within thirty six (36) calendar months from the date of the agreement.

(2) If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

24. Completion Of Common Facilities

(1) The Common facilities serving the said housing development shall be completed by the Vendor within thirty six (36) months from the date of this agreement.

(2) If the Vendor fails to complete the common facilities in time, the Vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.

[10] In the event of a delay the liquidated damages is to be paid immediately to the purchaser. The difficulties with the clause is that 'immediately' provided no time frame as to whether it is to be paid immediately daily, weekly, monthly, after the delivery of vacant possession, or as is maintained by the defendant, immediately after the plaintiffs settle their outstanding balances when vacant possession is delivered.

[11] Bearing in mind that the sale and purchase agreement is structured such that there are outstanding balance envisaged to be paid upon delivery of vacant possession, sub-cll. 2 above cannot have been intended for outright cash payments. Indeed, the plaintiffs had not sought such cash payments. They had, by their letter of 9 October 2002, merely demanded that liquidated damages that they claim to be entitled to under the sale and purchase agreement be set off against their outstanding balances. Setting off liquidated damages against the outstanding balances is not unreasonable.

[12] Although the defendant issued letters to the plaintiffs threatening to annul their sale and purchase agreements and forfeit 10% or 20% of the purchase price plus interest if the Purchasers failed to settle the outstanding progress payments and interest within 14 days thereof, this did not arise out of what would have been a frivolous and vexatious interpretation of demanding full settlement before paying out the liquidated damages, but because of the defendant's reliance upon s. 56 of the Contracts Act 1950 which provides:

> 56. Effect of failure to perform at fixed time, in contract in which time is essential.
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> (2) Effect of failure when time is not essential.
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> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.
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> (3) Effect of acceptance of performance at time other than that agreed upon.

> If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

[13] As the title shows, s. 56 concerns the effect to perform at the time fixed for doing so. If time was not of the essence, the contract does not become voidable by the failure to do the thing at or before the specified time. If time was of the essence, the contract would become voidable. Sub-clause (3) however has been interpreted as providing that where the contract becomes voidable on account of the promisor's failure to perform his promise at the time agreed, and the promisee accepts the delay, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so. Such an interpretation sits strangely with sub-cl. (2): why should a promisee where time is not of the essence in sub-cl. (2) not be required to give notice and does not suffer the burden upon a promisee where time is of the essence, not only of having to give notice and risk losing his right to compensation, but also to give that notice at the time of the acceptance.

[14] Before proceeding to consider and to determine that issue, it is necessary to return to the sale and purchase agreement. The general principle of construction of contracts applies to all contracts whether or not they are building contracts, and in every case the meaning of any clause in a particular contract has to be ascertained by looking at that contract as a whole and giving effect so far as possible to every part of it: *City Investment Sdn Bhd v. Koperasi Serbaguna Tanggungan Bhd* [1985] 1 MLJ 285, 288. The purpose of doing so is to give effect to the intention of the parties as at the time they entered into the contract, to obtain as between the contracting parties the highest degree of certainty and predictability towards the practical realization of their intentions expressed in the contract as is necessary to make commercial enterprises possible. It is premised upon the assumption that in arriving at their bargain the contracting parties have considered and accepted certain risks in the performance of the contract, and are therefore bound by their promises. While

the provisions of the Contracts Act 1950 provide the general framework, the terms of the contract reflect the particular issues and risks that the parties had specifically addressed their minds to, and specified their agreement.

[15] Clause 7 of the sale and purchase agreements provide that time is of the essence. Yet at the same time, and having agreed upon cl. 7, the parties at cll. 22 and 24 of the sale and purchase agreement provide for payment of liquidated damages in the event of delay in handing over vacant possession and completion of common facilities (jointly referred to as the completion dates).

[16] It is plain that the parties had not stopped at simply providing that time is of the essence, but qualified their agreement as to the time specified for completion by specifically providing in cll. 22 and 24 for liquidated damages for delay in handing over vacant possession. In the context of the sale and purchase agreements between the plaintiffs and the defendant, cl. 7 is not a true "time is of the essence" clause as envisaged by s. 56(1) of the Contracts Act 1950. Sections 56(1) and 56(3) are therefore not applicable to the sale and purchase agreements between the parties in this case. *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC, *Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89 CA, and *Sakinas Sdn Bhd v. Siew Yik Hau* [2002] 3 CLJ 275 are distinguishable on this ground.

[17] For this reason, the defendant's reliance upon s. 56 of the Contracts Act 1950 must fail.

The Economic Downturn

[18] The defendant also submitted that the economic downturn, which caused the delay, was beyond the control of the defendant. However, it is not shown that sale and purchase agreements have provided for economic downturn nor defined it for that purpose, as a ground to be relieved of the obligation to liquidated damages or for that matter, performance. Not only the defendant, but also the plaintiffs suffered from the delay caused by the economic downturn. Without specific provision for delay from economic downturn to exclude liability, the liquidated damages clause remains applicable.

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Conclusion

[19] Judgment was, therefore, entered for the plaintiffs:

(a) A declaration that the purported termination by the defendant of the sale and purchase agreements entered between by the plaintiffs and the defendant was and is invalid and void;

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(b) That the defendant pays the plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price within the time prescribed under the respective sale and purchase agreements;

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(c) That the defendant pays the plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price in respect of common facilities;

D

(d) A declaration that the plaintiffs are entitled to set-off the remaining purchase price to be paid to the defendant against such liquidated damages found due from the defendant to the plaintiffs under (b) and (c) above;

E

(e) An Order for payment by the defendant to the plaintiffs of all sums found to be due from the defendant to the plaintiffs after having set-off the remaining purchase price to be paid to the defendant against the liquidated damages found due under (b) and (c) above;

F

(f) That the defendant pays the plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the date of this Order to the date of actual delivery of vacant possession of the condominium units to the plaintiffs;

G

(g) That the defendant pays the plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price from the date of this Order to the date of actual completion of the common facilities;

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(h) An Order that the defendant delivers vacant possession and complete the common facilities of the condominium units to the plaintiffs;

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(i) A declaration that the defendant is not entitled to claim interest on late payments as of 31 January 1998 being the date where all works on the Sang Suria Condominium Projects came to a complete standstill;

(j) An Order for payment by the defendant to the plaintiffs of all sums of interest on late payments received after 31 January 1998;

(k) Interest;

(I) Costs to be assessed.